

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY**

Office of Government Ethics

BEGA – Advisory Opinion – *Letters of Recommendation and Letters of Support*

NOTICE OF DRAFT ADVISORY OPINION

The Director of Government Ethics, pursuant to the authority set forth in section 219(a-1)(2) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective February 22, 2014 (D.C. Law 20-75; D.C. Official Code § 1-1162.19(a-1)(2)) (2014 Supp.), hereby gives notice that he intends to issue, on his own initiative, an advisory opinion on Letters of Recommendation and Letters of Support, a topic which he considers a general question of law of sufficient public importance concerning a provision of the Code of Conduct over which the Ethics Board has primary jurisdiction.

All persons interested in commenting on this draft Advisory Opinion may do so not later than thirty (30) days after publication of this notice in the *D.C. Register* by sending comments electronically to bega@dc.gov or by filing comments in writing with Stacie Pittell, General Counsel, Board of Ethics and Government Accountability, 441 4th Street, N.W., 830 South, Washington, D.C. 20001.

Advisory Opinion

Letters of Recommendation and Letters of Support

Purpose of this Advisory Opinion

This advisory opinion addresses the propriety of letters of recommendation issued by District of Columbia public officials and employees. Such letters may be for: (a) individuals who are or were employees; (b) entities that hold or held contracts with the District government, receive District grants, or are otherwise accountable to the District for the administration of grant funds; or (c) civic or business entities, individuals, or not-for-profit entities seeking support for their projects or endeavors in the District. This advisory opinion serves to provide guidance regarding the appropriate use of District government letterhead and/or official titles or positions on such letters of recommendation or letters of support by government employees and public officials in both the Executive¹ and Legislative branches of District government.

¹ For the purposes of this opinion, independent agencies, as well as boards and commissions, are considered to be part of the Executive branch.

Whether serving in the Executive or the Legislative Branch of the District of Columbia government, individuals must adhere to certain guiding principles when writing letters of recommendation and letters of support. District employees and public officials must uphold a high standard of ethical conduct, place loyalty to the laws and ethical principles above private gain, and respect and adhere to the principles of ethical conduct so that every citizen can have complete confidence in the integrity of the District government.² A District employee or public official must not knowingly use the prestige of office or public position for his or her private gain or the gain of another.³ Also, District employees shall protect and conserve government property and shall not use it for other than authorized activities.⁴

General Good Ethics Principles and Authority Governing All Public Officials and Employees in the Executive and Legislative Branches

The Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 (2014 Supp.)),⁵ applies to all District of Columbia public officials and employees who perform a function of the District government and who receive compensation for the performance of such services, and to members of District government boards or commissions, whether or not for compensation (D.C. Official Code §1-1161.01(18)). The Ethics Act also gives the Board of Ethics and Government Accountability (the “Ethics Board”) the authority to enforce the Code of Conduct, the provisions of which are set forth at D.C. Official Code §1-1161.01(7) and include the Council Code⁶ and Chapter 18 of Title 6B of the District of Columbia Municipal Regulations (also known as the District Personnel Manual (“DPM”)). The guiding principle of the Code of Conduct is that all individuals who perform a function of the District government are required to represent the District government with integrity and refrain from using their positions and titles for private gain.⁷

Other relevant principles include the following:

DPM § 1800.3(a). Government service is a public trust, requiring employees to place loyalty to the laws and ethical principles above private gain.

DPM § 1800.3(h). Employees shall act impartially and not give preferential treatment to any private organization or individual.

² See, Title 6B of the D.C. Municipal Regulations (“DPM”) Section 1800.2.

³ See, DPM § 1800.3(g); see also Council Code of Official Conduct for Council Period 20 (“Council Code”), Rule VI(c)(1).

⁴ See, DPM § 1800.3(i); see also Council Code, Rule VI(a)(1).

⁵ In particular, see section 201a of the Ethics Act (D.C. Official Code § 1-1162.01a (61 DCR 5688)).

⁶ All District of Columbia Councilmembers and staff are subject to the Council Code, as well as the DPM. See Rule 202(b) and (c), Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 20. Although there is no express supremacy provision, where the Council Code and the DPM conflict, it is our practice to give precedence to the Council Code.

⁷ While neither the Ethics Act, the Council Code, nor the DPM define “private gain,” I interpret the term to mean private financial gain. See, generally, Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 Nw. U. L. Rev. 57 (1992).

Council Code, VI(c)(1). An employee may not knowingly use the prestige of office or public position for that employee's gain or that of another.⁸

Reasons for Allowing District Public Officials and Employees to Write Letters of Recommendation

Arguably, every type of recommendation is for the private gain of the individual or entity receiving the recommendation. That view, however, is too narrow because it does not account for the attendant benefits to the District that derive from maintaining productive relationships with former employees as well as private entities that may be doing or may have done business with the District in the past. It also does not address the benefits of encouraging civic and other entities to undertake new ventures in the District that may benefit the District and its residents.

For instance, it would be a disincentive to an individual who wants to otherwise become a District government employee if it was known that the person never could receive a positive reference for a job well-done when looking for future employment. The same would be true for a government contractor or grant recipient that might wish to apply for future contracts or grants from the District or from other governmental jurisdictions or private entities. Certainly, an entity's past performance for the District would be an important factor in successfully obtaining future contracts and grants, and to deny it an honest assessment would be to place it at a disadvantage over others. As a result, individuals and entities would have to carefully consider whether such a disadvantage is worth working for or doing any business with the District at all. In my view, that would deny the District the services of many qualified and skilled individuals and entities. As a result, I believe that providing a recommendation not only is a benefit to the recipients, but to the District as well and, therefore, doing so is not prohibited by the general restrictions on using title or position for private gain.

Similarly, there would be a disincentive for a civic or business entity seeking to undertake a project in the District if it could not garner the support it needs from the District government to do so. Prohibiting the Mayor, for example, from writing a letter of support for an entity seeking to engage in a project that may benefit District residents, might serve only to deprive those very District residents of the benefits of having that project completed. On the other hand, caution

⁸ The following additional Council Code provisions, among others, also are applicable:

Rule VI(c)(3). Council employees shall not use or permit the use of their position or title or any authority associated with their public office in a manner that could reasonably be construed to imply that the Council sanctions or endorses the personal or business activities of another, unless the Council has officially sanctioned or endorsed the activities.

Rule X(c)(3). Except as otherwise provided, an employee may not mail, as official mail, any material or matter that does not request information pertinent to the conduct of the official business of the Council.

Rule X(e)(3). A Councilmember may not use official mail to solicit directly or indirectly funds for any purpose.

Rule X(e)(4). A Councilmember may not use official mail for transmission of any matter that is purely personal to the sender or to any other person and is unrelated to the official business, activities, and duties of the member.

must be used to ensure that the imprimatur of government approval is not co-opted by a private entity for pecuniary gain. Accordingly, striking the right balance between a fact-based evaluation of the entity and the value of a project, while not giving the appearance of using District government office or title for the private gain of the entity, is important.

Letters of Recommendation

Guidelines for Employment-Related Letters of Recommendation for Current and Former District Employees

As previously stated, District employees and public officials are prohibited from using government resources, including District letterhead, for other than authorized activities.⁹ Therefore, special care must be taken when choosing whether to issue such a letter in the first instance. Doing so is discretionary, but in all cases this will require some sort of professional relationship – past or present – with the requestor. Statements in the letter, of course, should be limited to that relationship.

With respect to individuals who are employees or former employees, the recommendation must be based on personal knowledge of the individual’s ability. Addressing the individual’s ability to perform certain functions, contributions to the daily operations of the office or agency, and other general comments about performance are permitted by the DPM and the Council Code. By way of comparison, the United States Office of Government Ethics (“U.S. OGE”) also advises that a federal executive branch employee may write a letter of recommendation only based on personal knowledge of the ability or character of an individual with whom he or she has dealt in the course of federal employment or an individual whom he or she is recommending for federal employment.¹⁰

As previously mentioned, District employees and public officials must be careful to write letters of recommendation on official letterhead, using their official titles, only for individuals with whom they worked in an official capacity, and ensure that each particular letter relates to duties performed by the subject individual. The letters themselves should be evaluative in nature and provide factual details to support the underlying evaluations. Such letters are permissible for former employees, as well as volunteers, such as unpaid interns.

Authoring a letter of recommendation using an official District title or on District letterhead, however, is not permitted when the requestor is a family member or personal friend or an acquaintance with no professional connection to the District employee or public official. The U.S. OGE provides similar guidance, stating that a federal executive branch employee is

⁹ See, DPM § 1800.3(i), stating, “[e]mployees shall protect and conserve government property and shall not use it for other than authorized activities.” DPM § 1808.2(b) defines “authorized purposes” as “those purposes for which government property is made available to members of the public or those purposes authorized by an agency head in accordance with law or regulation.” See also Council Code VI(a)(1), which states that employees shall not: “[u]se Council time or government resources for other purposes than official business or government-approved or sponsored activities”

¹⁰ See, U.S. Office of Government Ethics, Use of Title or Agency’s Name, <http://www.oge.gov/Topics/Use-of-Government-Position-and-Resources/Use-of-Title-or-Agency%E2%80%99s-Name/>.

prohibited from writing a character reference on agency letterhead for a childhood friend applying for a private sector job.¹¹

Although the Council Code of Conduct contains provisions similar to the DPM with regard to using official title or government resources for private gain, there is an express exception for letters of recommendation.¹² Councilmembers and staff may sign an employment-related letter of recommendation using their official titles only in response to a request based upon personal knowledge of the ability or character of an individual or entity with whom they have dealt in the course of their Council employment, meaning the requestor is a current or former Council employee or has worked with the Council in an official capacity.¹³ In this instance, the letter of recommendation may address only the duties performed by the requestor during the course of employment or work completed in connection with the Council.¹⁴ If the Councilmember or staff member has no personal knowledge of the individual or entity's work ability or performance, the Councilmember or staff member may use his or her official title when signing the letter and write the letter on Council letterhead, but must restrict the content of the letter to character or residence of the individual or the entity requesting the letter.¹⁵

Members of the U.S. House of Representatives are subject to similar restrictions, as set forth in the House Ethics Manual.¹⁶ Members are permitted to write letters of recommendation or provide oral recommendations for applicants to executive branch federal government competitive service positions, but such recommendations are limited to addressing the applicant's residence and character if the Member does not have personal knowledge of the applicant's work performance or abilities.¹⁷ If, however, "the Member has personal knowledge of the applicant's work ability or performance, the federal hiring official may consider a recommendation based on the Member's personal knowledge or records that contain an evaluation of the job applicant's work performance, ability, aptitude, general qualifications, character, loyalty, or suitability."¹⁸ The House Ethics Manual also provides that letters of recommendation may be considered official business and written on official letterhead if the applicant is a current or former employee, who "has worked with the Member in an official capacity and the letter relates to the duties performed by the applicant."¹⁹

¹¹ See, U.S. Office of Government Ethics, Use of Title or Agency's Name, <http://www.oge.gov/Topics/Use-of-Government-Position-and-Resources/Use-of-Title-or-Agency%E2%80%99s-Name/>.

¹² Because the Council Code of Conduct provides express rules for letters of recommendation, these rules take precedence over the general rules regarding usual and customary constituent services, also found in the Council Code of Conduct. Council Code, Rule VI(c)(1) and (2) (Prestige of Office).

¹³ Council Code, Rule VI(d)(1) (Special Rules for Letters of Recommendation) states: "Employees may sign a letter of recommendation using their official titles only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual or entity with whom they have dealt in the course of their Council employment." Also, Council Code, Rule VI(d)(2) states: "Letters of recommendation may be written on Council letterhead if the applicant is a current or former Council employee or has worked with the Council in an official capacity and the letter relates to the duties performed by the applicant."

¹⁴ *Id.* at Council Code, Rule VI(d)(2).

¹⁵ See, Council Code, Rule VI(d)(3), which states: "If an employee does not have personal knowledge of an individual or entity's work ability or performance, the employee may sign a letter of recommendation on Council letterhead addressing only the character or residence of the individual or entity requesting the letter."

¹⁶ House Ethics Manual, Committee on Standards of Official Conduct, 110th Congress, 2d Session (2008 Edition).

¹⁷ *Id.* at 317.

¹⁸ *Id.* at 318.

¹⁹ *Id.* at 320.

In my view, the aforementioned requirements and restrictions represent a reasoned approach to providing letters of recommendation for employees and former employees. Regardless of whether the writer is employed by the Legislative or the Executive branch, the standards essentially are the same.

Guidelines for Letters of Recommendation for Contractors and Grantees

As an initial matter, anyone who undertakes to provide a letter of recommendation for a contractor or grantee must be certain that he or she has the authority to speak on behalf of the District government or the writer's employing agency or District entity. Generally, line-level employees and even low and mid-level managers do not have this authority. Councilmembers, the Mayor, and agency heads generally do have such authority, and in some cases, high-level executives, higher level managers, and Council staffers may have the express authority to do so.

Second, letters of recommendation for contractors, vendors, or grant recipients should be evaluative in nature. This means that they may contain only verifiable facts such as the timely completion of a project, noting whether all aspects of a contract were fulfilled, and whether the requestor stayed within budget.

Third, if possible and as a best practice, the letter should be addressed either to the requestor or "To Whom It May Concern" rather than to a specific person or entity.²⁰ This helps make it clear that the purpose of the letter is to evaluate the contractor, vendor, or grant recipient, and that such a letter may be used by the entity being evaluated for a variety of purposes. Addressing an evaluative letter "To Whom It May Concern" also assists with dispelling the notion that the writer of the letter is inappropriately using the weight of his or her office, title, or position in a coercive or unduly influential manner.

Fourth, because using District government letterhead or one's District title or position, alone, tends to influence the reader, the writer must be careful to ensure that representations made in the letter assess the performance of the requestor but do not include opinions or endorsements. In addition, the evaluative letter should not attempt to influence the recipient of the letter to provide the contractor, vendor, or grantee with a contract, grant, or other item of significant monetary value. The letter should not be written in such a way that it endorses the contractor, vendor, or grantee, or requests that the recipient of the letter do business with or otherwise engage the contractor, vendor, or grantee. Remember, there is a clear prohibition in the Code of Conduct from using one's position or title for private gain. Letters of recommendation that state that the entity deserves to receive a contract or grant are not permissible because the author no longer is speaking to the ability of the requestor or past performance, but instead is attempting to influence the outcome of the contract or grant award process.²¹ Evaluative letters of recommendation

²⁰ If addressing the letter "To Whom it May Concern" is not practical or permitted by the rules governing the application or other matter for which the contractor, vendor, or grantee is seeking the letter of recommendation, then it is permissible to address the letter to the party seeking the letter. This still allows the requestor to use the letter as appropriate and does not create the appearance that the letter writer is inappropriately using the weight of his or her office, title, or position in a coercive or unduly influential manner. It is not permissible, however, to address the letter to the party from whom the requestor is seeking any benefit.

²¹ See, U.S. Office of Government Ethics Advisory Memorandum 99 x 15: Use of Official Title.

should summarize the entity's performance without advocating for a particular outcome with regard to a contract or grant, for example.

Accordingly, using government letterhead or the writer's official title or position when writing a letter of recommendation is permissible under the DPM and the Council Code of Conduct if the letter evaluates the contractor or grantee requesting it, but does not endorse or advocate for the requestor. The letter should be based on personal dealings with the contractor or grantee or entity and also should contain verifiable facts.

Letters of Support

Guidelines for Letters of Support for Civic or Business Entities or Projects Seeking Support for Their Endeavors in the District

Councilmembers and the Mayor²² frequently are contacted by individuals, not-for-profit entities, and other public and private business organizations requesting letters of support for endeavors or projects they propose to undertake in the District. In fact, many of the questions this Office receives from Councilmembers concern their responses to such requests, which suggests, I believe, that letters of support represent an often used – and acceptable – means of providing constituent services. In any event, as with letters of recommendation for contractors, grantees, or vendors, letters of support should be as evaluative as possible.

Accordingly, the District official writing a letter of support may provide details of his or her relationship with the requestor and may express support for the proposed endeavor or project. The letter should detail clearly the reasons for such support, wherever possible. For example, the official writing a letter of support for a public charter school applying for New Markets Tax Credits to help in a facilities renovation project may have first-hand knowledge of the school's earlier expansion efforts to serve more students in the community. Including language concerning the expansion efforts, how they served to attract qualified students and to support a high ranking by the Public Charter School Board, and other similar details, for example, serves to provide factual and evaluative reasons for the letter of support.

In terms of support, the letter may, for instance, make statements such as, "I support this entity in its endeavor," or "I support this endeavor." The letter also may include language asking a government agency to "consider these factors in its decision," because this makes it clear that the ultimate decision rests with the agency. Letters of support should avoid a clear endorsement,

²² Although the DPM does not contain a specific provision that expressly authorizes the Mayor to write letters of support, it does contain a provision that allows the Mayor to serve "as an honorary chair or honorary member of a nonprofit entity's fundraising event, so long as the entity for which funds are raised supports a nongovernmental bona fide charitable activity benefiting the District of Columbia. Use of the Mayor's name or title in fundraising solicitations or announcements of general circulation shall be in accordance with such terms and limitations as the Mayor may prescribe by Mayor's order or by direction in particular cases." DPM § 1805.10. Therefore, I analogize the Mayor's ability to use his or her name, title, or position in a letter of support that otherwise meets the guidelines set forth in this Advisory Opinion to the DPM provision that allows the use of the Mayor's name or title in fundraising, because in both instances, the ultimate beneficiary is the District of Columbia. I note, however, that DPM § 1805.10 prohibits "the use of the Mayor's name or title in solicitations made by or on behalf of the Mayor directly to individual contributors," and I apply that prohibition to letters of support as well.

such as “I endorse.” They also should avoid outright asking for funding for the entity, or directing a government agency to decide to provide funding or other benefits to the entity. I note, however, that for charitable fundraising, a special exception exists for Councilmembers. This exception, contained in the Council Code of Conduct, permits a Councilmember to serve as an honorary chair or member of a non-profit entity’s fundraising event and even to allow use of his or her name and title in solicitations and announcements as long as such are not made directly to individual contributors. This exception applies only to supporting a nongovernmental *bona fide* charitable activity. (Council Code, Rule VI(c)(1)(4)).

Letters of support should not include wholly unsupported opinions or endorsements of the requesting individual, business, or entity. Nevertheless, if the letter writer has no knowledge of the requestor that can serve as factual support for the letter, he or she can support the project itself. For example, the writer may highlight how much a project such as the one proposed would benefit the neighborhood in which it would be located, if successfully completed. Further, the letter of support should not go so far as to ask or recommend that a private business, individual, or not-for-profit be given a contract, grant, or other item that would constitute a financial benefit. Details are important in this respect and any uncertainty concerning proposed language that might exceed what is permissible should be vetted in advance by this Office. Finally, in the case of a Councilmember who writes a letter of support that otherwise meets the guidelines, the Councilmember must ensure that he or she does not give the appearance that the Council itself officially sanctioned or endorsed the activities discussed in the letter.²³

On the Executive side, in addition to the restrictions outlined above, the Mayor has issued a Mayor’s Memorandum which provides guidelines for Mayoral letters of support. *See* Mayor’s Memorandum 2007-3 (June 5, 2007). These guidelines are somewhat more restrictive than the minimal standards discussed herein. The Memorandum requires that any such letter:

- ★ Shall be addressed to the party seeking the letter and not to a party from whom the requestor is seeking any benefit;²⁴
- ★ Shall not include any language related to fundraising, including solicitations or support for solicitations;
- ★ Shall not include any endorsement of a commercial product;
- ★ Shall not be written on behalf of a party to litigation or an administrative judicial matter;
- ★ Shall not be written on behalf of a commercial or for-profit circumstances (except under limited circumstances deemed by the Deputy Mayor for Economic Development to be in the interest of the District of Columbia);

²³ Specifically, Council Code, Rule VI(c)(3) (Prestige of Office) states: “Council employees shall not use or permit the use of their position or title or any authority associated with their public office in a manner that could reasonably be construed to imply that the Council sanctions or endorses the personal or business activities of another, unless the Council has officially sanctioned or endorsed the activities.”

²⁴ This provision exceeds minimal ethics standards for letters of support. I recognize that in certain limited instances where the District is involved in a joint undertaking with a private entity, often in some form of a public-private partnership, in which both the District and the private entity have an interest in obtaining funds from a third-party, it may be beneficial to the District to address the letter to the grantor and to have the letter of support contain information about the District’s relationship with the private party. Even in that situation, however, the support letter should not endorse the private entity or make claims without factual support.

- ★ Shall contain no assertion of facts and make no representations as to the truth of statements provided by the requestor; and
- ★ Shall not warrant the quality of any performance, service, or program, or attest to anyone's character.

It should be noted that this, or any Mayor's Memorandum, applies only to the Executive and executive staff and not to the Council or its staff. It can be rescinded or modified at any time. In this case, it applies only to the Mayor.

Executive agency officials such as agency heads or other high-level executives authorized to speak for the agency also may be contacted by a private business, individual, or not-for-profit and asked to write a letter of support for an endeavor or project the individual or entity is seeking to do in the District. In general, I have a concern about individual agencies, particularly executive agencies, writing letters of support for individuals or entities that are not current or former employees, contractors, vendors, or grantees. The concern is that when an agency head speaks, there is at least a risk of public perception that the agency head is speaking for the entire District government when, in fact, the Mayor should speak for the government.

That being said, however, I recognize that there may be individual instances in which it is appropriate for an agency official to write such a letter of support. For instance, where a civic association or non-profit is involved in a project or event that clearly and directly supports the mission of a District agency or the constituents of the agency, some flexibility should be shown in light of the attendant benefits to the agency in carrying out a legitimate governmental function. An example might include a not-for-profit that caters to the needs of the elderly in the District and which holds an event to raise awareness of available services. In that instance, following the guidelines set forth above, it would not be inappropriate for an agency head to support the event publicly, as long as the event itself is not a fundraiser.

Please be advised that this advice is provided pursuant to section 219(a-1)(1) of the Ethics Act (D.C. Official Code § 1-1162.19(a-1)(1), which empowers me to issue, on my own initiative, an advisory opinion on any matter I deem of sufficient public importance concerning a provision of the Code of Conduct over which the Ethics Board has primary jurisdiction.

For further assistance, especially in resolving any questions about the permissibility of sending a given letter or its substantive text, please feel free to contact the staff of this Office at (202) 481-3411.

Respectfully,

_____/s/
DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

#1040-001